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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Implementation of the Local
Competition Provisions of the
Telecommunications Act of 1996

Interconnection between Local
Exchange Carriers and Commercial
Mobile Radio Service Providers

CC Docket No. 96-98

CC Docket No. 95-185

**REPLY COMMENTS OF THE
COMPETITIVE TELECOMMUNICATIONS ASSOCIATION**

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TELECOMMUNICATIONS ASSOCIATION**

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SUMMARY

Section 251(c)(3) is clear on its face. Telecommunications carriers may purchase transport UNEs and use them, without restriction, to provide any telecommunications service to themselves or others, including exchange access and interexchange service.

The arguments of the incumbent LECs and ALTS should not lead the Commission to restrict such use of transport UNEs to cases where the purchasing carriers also provide local exchange service to the end user from or to whom traffic is being originated or terminated, respectively. Arguments that unrestricted use of transport UNEs will undermine universal service support are unsubstantiated. These contentions also do not comport with earlier Commission findings in its *Access Charge Reform* and *Universal Service* proceedings that access charges — with their alleged implicit subsidies — need not be imposed on UNEs to support the ILECs' universal service obligations.

Moreover, removing all restrictions on carriers' use of transport UNEs to provide exchange access and interexchange services is not, as some commenters argue, inconsistent with federal or state jurisdiction over interstate or intrastate access charges, respectively. UNEs are nonjurisdictional in nature and are not to be confused with exchange access. The exchanges access rules will remain in effect, and the FCC will retain jurisdiction over carriers that take UNEs and offer interstate exchange access services to another carrier.

Similarly, removing any restrictions on the use of transport UNEs will not eviscerate Section 251(g) of the Communications Act, contrary to the contentions of some ILECs. Section 251(g), and the obligations it imposes upon ILECs to offer exchange access services,

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will not be affected by the ruling CompTel advocates. That ruling will address how carriers purchasing UNEs may use them to provide telecommunications services, not whether ILECs must still offer access charges, which they must.

In conclusion, for the foregoing reasons and those in CompTel's opening Comments, the Commission should issue a ruling making plain that ILECs must allow carriers, without restriction, to originate and terminate calls using unbundled shared or dedicated transport (in combination with unbundled tandem switching) regardless of who serves the end user as local exchange carrier.

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COMPETITIVE TELECOMMUNICATIONS ASSOCIATION**

The Competitive Telecommunication Association ("CompTel"), by its attorneys, hereby replies to the comments responding to the *Further Notice of Proposed Rulemaking* in the above-captioned proceeding.¹ As CompTel demonstrated in its opening comments, the Commission should rule that telecommunications carriers may purchase dedicated or shared transport circuits on an unbundled network element ("UNE") basis and, in conjunction with unbundled switching, use such circuits to originate and terminate toll traffic to customers to whom the carrier does not provide local exchange service.

CompTel was joined in its position by a number of other commenters, including AT&T, MCI, WorldCom, and at least two competitive local exchange carriers ("CLECs"), KMC Telecom and LBC Communications. As KMC Telecom summarized, adoption of the

¹ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Third Order on Reconsideration and Further Notice of Proposed Rulemaking, CC Docket No. 96-98, FCC 97-295 (Aug. 18, 1997) ("Third Reconsideration Order" and "Further Notice").

ruling CompTel and others advocate "will add flexibility to the service configurations which competitive LECs or IXC's can offer to their customers and by doing so will hasten the introduction of greater competition, objectives fully consistent with the provisions of section 251 of the Communications Act, with the Commission's policies in local competition and with all current judicial interpretations relevant to the question presented."² In addition, such a result would further "the Commission's plan to achieve market-based access reform through the availability of UNE-based competition."³

Predictably, the incumbent local exchange carriers ("ILECs") oppose such an outcome, which constitutes a natural and unavoidable extension of the *Local Competition Order*⁴ and the *Third Reconsideration Order*. The proposed rule change would be natural because it is clearly foreshadowed, to put it lightly, in the *Local Competition Order*:

We confirm our tentative conclusion in the NPRM that section 251(c)(3) permits interexchange carriers and all other requesting telecommunications carriers, to purchase unbundled elements for the purpose of offering exchange access services, or for the purpose of

² Comments of KMC Telecom at i.

³ Comments of AT&T at 2.

⁴ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Report and Order, CC Docket No. 96-98, 11 FCC Rcd 15499 (*Local Competition Order*), *Order on Reconsideration*, 11 FCC Rcd 13042 *Second Order on Reconsideration*, 11 FCC Rcd 19738 (1996), *Third Reconsideration Order*, *supra*, further recon. pending, *aff'd on part and vacated in part sub. nom. CompTel v. FCC*, 117 F.3d 1068 (8th Cir.) (*CompTel*), *aff'd in part and vacated in part sub nom. Iowa Utilities Bd. v. FCC and consolidated cases*, No. 96-3321 et al., 1997 WL 403401 (8th Cir., Jul. 18) (*Iowa Utilities Bd.*), *modified on rehearing, slip op.* (8th Cir. Oct. 14, 1997).

providing exchange access services to themselves in order to provide interexchange services to consumers.⁵

A Commission ruling that carriers may use transport UNEs without restriction is inevitable because there is nothing in Section 251(c)(3) that restricts a carrier's ability to use and combine network elements to offer "a telecommunications service;"⁶ and, as noted below, transport is not inherently dedicated to a particular customer.

A few other commenters, including the Association for Local Telecommunications Services ("ALTS"), also opposed the proposed rule modification. But, as detailed below, none of the arguments asserted by the opponents provide persuasive reasons for not making clear that, under Section 251(c)(3) of the Act, any carrier may use shared or dedicated transport to provide "any telecommunications service," including exchange access and interexchange service. Accordingly, the Commission should make the ruling urged by CompTel.

I. THE RULING COMPTTEL ADVOCATES WILL NOT UNDERMINE UNIVERSAL SERVICE SUPPORT

A number of the opponents of the Commission's proposal contend that the ability of a carrier to purchase transport on a UNE basis and to use it to originate and terminate calls from and to customers for whom the carrier does not provide local exchange service will undermine universal service. Specifically, several commenters contend that current access

⁵ *Local Competition Order*, 11 FCC Rcd at 15,679.

⁶ *See id.*

charges contain implicit subsidies of local exchange services. Were the unrestricted use of transport UNEs condoned, these parties complain, there will be a substantial shortfall in the collection of universal service monies.⁷

However, the Commission already has found that the availability of UNEs to carriers at cost-based prices without the subsidies that might remain in access charges are "unlikely to have [a] dramatic short-term impact on the ability of price cap LECs to fulfill their universal service obligations."⁸ Accordingly, the Commission concluded that the universal service obligations of price cap LECs did not compel the Commission to conclude that access charges must be assessed on the purchase of UNEs that are used for exchange access or universal service.⁹ These findings make clear that the Commission should *not*, in deference to the ILECs' alleged concern about vestigial inclusion of implicit subsidies in access charges, modify its earlier determination in the *Local Competition Order* that Section 251(c)(3) permits the use of UNEs to provide exchange access and interexchange service.

Moreover, despite the ILECs' dire predictions of revenue shortfalls, the facts suggest otherwise. As an initial matter, the proposed rule changes would not significantly affect the

⁷ See, e.g., Comments of GTE at 2-3; Comments of USTA at 9.

⁸ *Access Charge Reform*, Order, CC Docket No. 96-262, FCC 97-216 (June 18, 1997) ¶ 20.

⁹ *Access Charge Reform*, First Report and Order, CC Docket No. 96-262, FCC 97-158 (May 16, 1997) ¶ 338 (subsequent history omitted). See also *Federal State Board on Universal Service*, Report and Order, CC Docket No. 96-45, FCC 97-157 (May 8, 1997) ¶ 15. (subsequent history omitted)(interstate implicit support for universal service will be removed from interstate access charges).

level of revenues that ILECs receive from access charges. As AT&T notes, in those situations where ILECs remain the provider of local exchange services to the end user, ILECs will continue to receive access charge revenues associated with the unbundled loop (including the presubscribed interexchange carrier charge, or "PICC") and local switching. These ILECs will continue to collect end-user access fees, such as the subscriber line charge.¹⁰ Furthermore, were carriers to use transport UNEs as proposed, ILECs will be compensated for use of shared or dedicated transport,¹¹ as well as tandem switching,¹² because prices will be set to cover costs plus a reasonable profit.¹³ Accordingly, there is little realistic prospect for any wholesale diminution of ILEC access revenues as a result of the proposed rule changes.

Indeed, a review of the ILECs' comments makes clear that these parties merely are making yet another attempt in the increasingly deregulated telecommunications environment to secure what they can of what historically had been a source of guaranteed revenues.

¹⁰ AT&T Comments at 7.

¹¹ CompTel also notes that, typically, there is little difference between the UNE and existing access tariff prices for dedicated transport.

¹² While it was implicit in CompTel's opening comments (*See* Comments of CompTel at 9-11), CompTel wholeheartedly joins in the comments of WorldCom that the unbundled switching referred to in the *Further Notice* to be used in conjunction with transport UNEs is *tandem* switching. Comments of Worldcom at 8. Accordingly, those arguments the ILECs make regarding the fact that the local loop and parts of the local switch are dedicated to a particular customer are simply beside the point because the *Further Notice* does not contemplate allowing multiple carriers to access the local loop or line card serving an individual customer.

¹³ *Id.*; *see also* 47 U.S.C. § 252(d)(1).

These efforts should not be countenanced. There is virtually no evidence in the record that the universal service revenues recovered through implicit subsidies contained in access transport charges is sizeable. Absent such evidence, and given that the record does not support the conclusion that the overall impact on ILEC revenues will be dramatic, as they assert, the Commission should decline to adopt any restrictions on the use of transport UNEs out of fear for the alleged impact on the provision of local exchange service.¹⁴

II. THE RULING COMPTTEL ADVOCATES IS CONSISTENT WITH BOTH THE ACT AND THE CURRENT APPORTIONMENT OF FEDERAL AND STATE JURISDICTION OVER ACCESS CHARGES

As CompTel demonstrated in its initial comments, Section 251(c)(3) of the Act plainly compels the result that no restrictions should be placed on the use of transport UNEs. The Commission itself has already concluded the "there is no statutory basis upon which [it] could reach a different conclusion" than "requesting telecommunications carriers may seek access to unbundled network elements to provide a 'telecommunications service,' and exchange access and interexchange services are telecommunications services."¹⁵

¹⁴ The arguments of some ILECs that the Court's decision in the *CompTel* case (*see* note 4, *supra*) would permit the FCC to continue to suppress the natural consequences of Section 251(c)(3) are misplaced. *See, e.g.*, Comments of USTA at 10. The Court in that case upheld a transitional measure of definite and limited duration until the *Access Charge Reform* proceeding adopted new rules. *See* 117 F.3d at 1074-75. What the ILECs seek is a new "transitional" measure of indefinite duration (at least several years). This is a call for a much more onerous restriction on carriers' unrestricted use of UNEs that could not be supported by the Court's rationale in *CompTel*.

¹⁵ *Local Competition Order*, 11 FCC Rcd at 15,679. *See also* Comments of WorldCom at 5-6.

ALTS contends that the Commission should not, "at the present time," "extend" the interpretation of Section 251(c)(3) to permit the unlimited use of transport UNEs.¹⁶ However, it is clear that the ALTS request is motivated by a desire to maintain a pricing umbrella for its membership under non-cost based ILEC access charges, and that its position is not founded upon any plausible statutory construction. In fact, ALTS incorrectly characterizes the Commission's decision "permitting" competitive local exchange carriers that purchase an unbundled loop to provide exchange access and interexchange service to the customer, in addition to local exchange service.¹⁷ The salient point is not that the Commission "permitted" carriers that purchased unbundled loops to provide such services. In fact, that characterization is not even accurate. Rather, the Commission determined that the purchaser of the loop "must" provide all services that the customer requests.¹⁸ However, in contrast, where a carrier purchases transport UNEs, no such requirement follows because, as LBC Communications notes, "neither [shared nor dedicated transport] are dedicated to a particular local exchange customer."¹⁹ Thus, ALTS's argument for "freezing" the current extent of Section 251(c)(3) has no basis in fact or law and should be rejected.

¹⁶ Comments of ALTS at 8.

¹⁷ *Id.* at 6-7.

¹⁸ *Local Competition Order*, 11 FCC Rcd at 15679; *First Reconsideration Order*, 11 FCC Rcd at 13048.

¹⁹ Comments of LBC at 2. *See also* Comments of WorldCom at 8.

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In addition, the Commission will not, as some parties contend, be ceding any authority over interstate access charges under Section 201 of the Act if it adopts the proposed rule.²⁰ Rather, the Commission would merely be confirming, as it did in the *Local Competition Order*, that UNEs do not fit the jurisdictional categories handed down by the separations process, and can be used to provide either intrastate and interstate service, or both.²¹ In short, UNEs are nonjurisdictional in nature.

Moreover, as the Commission noted in the *Local Competition Order*, despite the fact that UNEs could be used by an IXC to originate and terminate interstate calls:

Our exchange access rules remain in effect and will still apply where incumbent LECs retain local customers and continue to offer exchange access service to interexchange carriers who do not purchase unbundled elements, and also where new entrants resell local service.²²

In addition, where a carrier takes transport and tandem UNEs and offers interstate access services to another carrier, the FCC would retain jurisdiction over such access services. Similarly, the states will retain authority over intrastate access services. The Commission's refusal to restrict use of transport UNEs would not change that.

²⁰ See, e.g., Comments of Ameritech at 11; Comments of GTE at 11. See also 47 U.S.C. §251(i).

²¹ See *Local Competition Order*, 11 FCC Rcd at 15,545, and 15,682. For similar reasons, the Commission should reject GTE's argument that the proposed rule would improperly transfer jurisdiction over intrastate access to the federal agency. See Comments of GTE at 12. Besides contradicting GTE's argument that federal jurisdiction would be ceded to the states, the proposed rule merely implements what is already explicit in Section 251(c)(3): UNEs may be used to provide any telecommunications service.

²² *Local Competition Order*, 11 F.C.C. Rcd at 15680.

The other arguments of the ILECs regarding consistency with various provisions of the Communications Act similarly have no merit. Indeed, most of these arguments have been raised and rejected by the Commission in the past. For example, some parties contend that Section 251(g) prohibits the use of UNEs for origination and termination of interexchange traffic as contemplated in the *Further Notice*.²³ That provision required each LEC providing exchange access to exchange carriers to do so "in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that appl[ied] to such carrier" immediately prior to the passage of the Telecommunications Act of 1996.²⁴ Affected LECs were required to provide such access until the Commission adopted explicitly superseding regulations, which it did in its *Access Reform* proceeding.

Nothing proposed by CompTel in response to the *Further Notice*, if adopted, would alter the obligation of LECs to offer exchange access. As the FCC noted in the *Local Competition Order*:

[T]he primary purpose of section 251(g) is to preserve the right of interexchange carriers to order and receive exchange access services if such carriers elect not to obtain exchange access through their own facilities or by means of unbundled elements purchased from an incumbent.²⁵

²³ See, e.g., Comments of Ameritech at 6-7.

²⁴ 47 U.S.C. § 251(i).

²⁵ *Local Competition Order*, 11 FCC Rcd at 15,682.

Thus, the Commission notes that Section 251(g) was not a requirement that IXC's continue to *purchase* exchange access services, merely that ILEC's continue to make such services *available*.

To suggest otherwise misses a fundamental point: the *Further Notice* does *not* propose to allow carriers to buy *exchange access transport* at UNE prices. To the contrary, the *Further Notice* proposes that carriers, under Section 251(c)(3) and as applied in specific circumstances, be *entitled* to purchase *transport UNEs* and use those UNEs to provide any telecommunications service they like (and are otherwise authorized to provide).

It is ironic that this distinction is so difficult for opponents of the proposed rule to fathom when many of these same parties apparently acknowledge that there is a difference between UNEs and access charges.²⁶ As a result, their argument goes, transport facilities may *not* be used to provide carriers with the transport functions served by ILEC access charges.

Although these carriers got the premise correct, they failed to draw the right conclusion. The FCC explained in its *Local Competition Order* that "carriers [have the ability] to obtain unbundled elements for purposes of providing interexchange services."²⁷ But when IXC's "purchase unbundled elements from incumbents, they are not purchasing exchange access 'services'."²⁸ Rather, such IXC's are simply purchasing UNEs, which are

²⁶ See, e.g., Comments of GTE at 3; Comments of Ameritech at 16.

²⁷ 11 FCC Rcd at 15,680.

²⁸ *Id.*

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governed by Sections 251 and 252 of the 1934 Act, whereas access services continue to be governed by Section 201 and is available under tariff. In short, despite their statements to the contrary, it is the ILECs that, in effect, improperly seek to equate transport UNEs and access transport rate elements by requesting that UNEs be available only for limited purposes to ensure they do not impact access revenues, despite the potentially restraining impact on competition and the provision of innovative telecommunications services.²⁹

²⁹ In the *Local Competition Order*, the Commission recognized that the availability of UNEs under Section 251(c)(3) would potentially change the "volume of access services . . . interexchange carriers are likely to demand." *Id.*

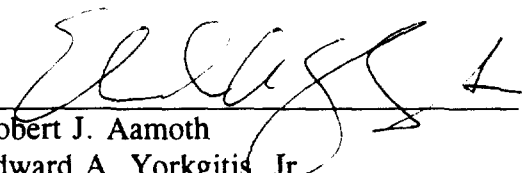
III. CONCLUSION

In sum, the Commission should make clear that carriers may originate and terminate interexchange calls using shared and dedicated transport UNEs (in combination with unbundled tandem switching) regardless of who serves the end user as local exchange carrier or other restriction. As explained herein, such a ruling will not undermine universal service, preserves both federal and state jurisdiction over access charges, and is otherwise consistent with the Communications Act of 1934.

Respectfully submitted,

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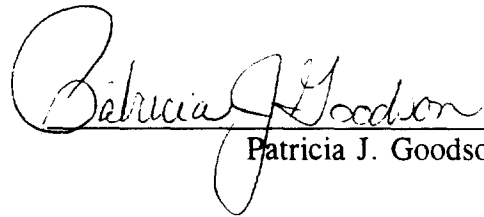
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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Reply Comments were served by hand delivery on this 17th day of October, 1997, to the following parties:

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